

JOINT POWERS AGREEMENT
BETWEEN THE CITY OF ALBUQUERQUE, COUNTY OF BERNALILLO AND
ALBUQUERQUE-BERNALILLO WATER UTILITY AUTHORITY REGARDING
ISSUANCE OF REVENUE BONDS

This Joint Powers Agreement (“JPA” or “Agreement”) is entered into on the ____ day of November 2003 by and between the City of Albuquerque (“City”), the County of Bernalillo (“County”) and the Albuquerque-Bernalillo Water Utility Authority (“Authority”). Individually, the City, County and Authority may be referred to as a “Party” and collectively as the “Parties” under this JPA.

A. BACKGROUND

1. New Mexico Senate Bill 887 (Laws 2003, Chapter 437, codified as NMSA 1978, § 72-1-10) created the Authority, effective June 21, 2003.
2. The Authority is a “joint agency of the two governments [City and County] and is subject to the state Procurement Code and other applicable state laws.” NMSA 1978, § 72-1-10 (2003).
3. The Authority is charged with “administer[ing] the water and wastewater utility of Albuquerque and Bernalillo county.” NMSA 1978, § 72-1-10 (2003).
4. The legislation creating the Authority requires that “[a]ll functions, appropriations, money, records, equipment and other real and personal property pertaining to the Albuquerque water and wastewater utility shall be transferred to the Albuquerque-Bernalillo water utility authority.” NMSA 1978, § 72-1-10 (2003).
5. The legislation creating the Authority provides that debts of the Albuquerque water and wastewater utility shall be debts of the Authority and that the Authority shall not impair the rights of any bondholders of outstanding bonds of the Albuquerque water and wastewater utility. NMSA 1978, § 72-1-10 (2003).
6. The New Mexico Legislature provided that the Authority had the power of “determination and imposition of rates for services” and that it “shall issue revenue bonds” when the Authority assumed the debts of the Albuquerque water and wastewater utility and it became necessary to refund the City bonds pledged by property taxes. NMSA 1978, § 72-1-10 (2003).
7. The legislation creating the Authority requires that the New Mexico Public Regulation Commission (“PRC”) audit the City utility prior to transfer of the money, assets and debt of the Albuquerque water and wastewater utility, NMSA 1978, § 72-1-10 (2003); this audit is not yet completed, but this Agreement anticipates the completion of the audit and the transfer of the City utility to the Authority.
8. The New Mexico Joint Powers Agreements (“JPA Act”), NMSA 1978, §§ 11-1-1 to 11-1-7 (1999), authorizes two or more public agencies to jointly exercise by agreement any power common to the contracting parties, NMSA 1978, § 11-1-3 (1983), subject to any of the restrictions imposed upon the manner of exercising such power of one of the contracting public agencies. NMSA 1978, § 11-1-5 (1961). The common power specified in the agreement is possessed by the administering agency. NMSA 1978, § 11-1-5 (1961). The JPA Act further provides, subject to limited conditions,

that the administering agency may issue revenue bonds to effectuate the purpose of the JPA. NMSA 1978, § 11-1-7 (1961).

9. Pending the results of the audit being performed by the PRC, there are \$252,900,000.00 of outstanding debts of the Albuquerque water and wastewater utility issued by the City pursuant to duly adopted and approved ordinances, resolutions and agreements.

10. In both the near and long term, the City and Authority will have capital needs for expansion or improvement of the utility System, which may necessitate the issuance of bonds or other obligations to be secured by revenues of the utility System.

11. The City and County desire the Authority to meet the anticipated capital needs by utilizing the common revenue bonding power of the City and County.

12. At its meeting of September 18, 2003, the Authority requested the Parties hereto enter into a joint powers agreement to facilitate financing and capital needs of the Authority.

B. TERMS AND CONDITIONS

13. Purpose. The purpose of this Agreement is to set forth the procedure for the issuance of revenue bonds or other obligations needed to finance the utility's capital needs.

14. Definitions.

a. System. The public utility designated as the City's water system and sanitary sewer system, as required to be transferred to the Authority in accordance with NMSA 1978, § 72-1-10 (2003), and consisting of all properties, real personal, mixed or otherwise, now owned or hereafter acquired by the City, County or Authority through purchase, construction or otherwise, including all extensions, enlargements and improvements of or to the water and sanitary sewer system and used in connection therewith or relating thereto, and any other related activity or enterprise of the City, County or Authority designated by the City, County or Authority as part of the water and sanitary sewer system, wherever situated.

b. Gross Revenues. All income and revenues directly or indirectly derived by the Authority from the operation and use of the System, or any part of the System, and includes, without limitation, all revenues received by the Authority or agency succeeding to the rights of the Authority, from the System and from the sale and use of water, water services or facilities, sewer service or facilities or any other service, commodity or facility or any combination thereof furnished to the inhabitants of the City and County (including all territorial annexations which may be made while any bond or other obligations issued in accordance with this Agreement is outstanding) by means of the System. Such term also includes:

- (1) All income derived from the investment of any such money including surplus net revenues,
- (2) Money released from any rebate programs, and
- (3) Property insurance proceeds that are not necessary to restore or replace the property lost or damaged and the proceeds of the sale or other disposition of any part of the System.

c. Net Revenues. The gross revenues after deducting operation and maintenance expenses.

d. Operation and maintenance expenses. All reasonable and necessary current expenses of the System, paid or accrued, related to operating, maintaining and repairing the System, including, without limiting the generality of the foregoing:

- (1) Legal and overhead expenses of the various operating units directly related and reasonably allocable to the administration of the System,
- (2) Insurance premiums for the System, including, without limitation, premiums for property insurance, public liability insurance and workmen's compensation insurance, whether or not self-funded,
- (3) Premiums, expenses and other costs for credit facilities,
- (4) All expenses other than expenses paid from the proceeds of bonds and other similar indebtedness payable solely or primarily from net revenues of the System,
- (5) Costs of audits of the books and accounts of the System,
- (6) Amounts required to make rebate payments to the United States Government that relate to the System,
- (7) Salaries, administrative expenses, labor costs, surety bonds and the cost of materials and supplies used for or in connection with the current operation of the System.

Operation and maintenance expenses do not include any allowance for depreciation, payments in lieu of taxes, liabilities incurred by the City, County or Authority as a result of its negligence or other misconduct in the operation of the System or any charges for the accumulation of reserves for capital replacements.

15. Procedures and Duties Concerning Financing.

a. Procedure. The City, County and Authority agree to follow the procedures set forth in this Section for structuring and issuing bonds or other obligations payable from Net Revenues of the System.

- (1) In accordance with NMSA 1978, § 72-1-10 (2003), the City and County hereby designate the Authority to act as the administering agency to issue bonds or incur other obligations on behalf of the Authority, which are to be secured by irrevocable pledges of the Net Revenues of the System. The bonds or other obligations shall include all necessary provisions and be issued in compliance with the terms of outstanding debt of the System and in such manner that no impairment of outstanding debt will result.
- (2) Bonds or other obligations may be issued for the purpose of acquiring, constructing, condemning, extending, enlarging, bettering, repairing or otherwise improving or maintaining the System, including water rights for the System and payment of all costs incidental to the foregoing and the issuance of any bonds or other obligations.
- (3) The Authority shall pledge the Net Revenues of the system to secure bonds or other obligations.
- (4) The legal firms serving as bond counsel to the City and as bond counsel to the County shall serve as co-bond counsel for all bonds or other obligations in accordance with their respective contracts, unless otherwise agreed to by the parties.

(5) The legal firms serving as disclosure counsel to the City and as disclosure counsel to the County shall serve as co-disclosure counsel for all bonds or other obligations in accordance with their respective contracts, unless otherwise agreed to by the parties.

(6) The bonds or other obligations issued by the Authority may be sold at public or private sale as determined by the Authority.

(7) Any capital needs identified by the Authority for expansion or improvement of the System, including expansion of the System outside the boundaries of the City service area as they exist on this date, that are the subject of funding under this Agreement shall:

- (a) be approved by a majority vote of the members of the Authority;
- (b) be subject to provisions of relevant updated planning documents that have been approved by the City and/or County;
- (c) reflect current law with respect to supply of water and wastewater facilities both within and beyond existing System service boundaries; and
- (d) be at no net expense to the Authority, such that revenue generated from any expansion or improvement of the System shall be sufficient to support the costs of water and wastewater facilities in any expansion or improvement of the System and related infrastructure needed to serve any expansion or improvement of the System. In keeping with this 'no net expense' policy, the parties agree:
 - a. Facilities provided must meet the level of service standards adopted in a development agreement signed by the developer and the Authority;
 - b. Any interim revenue generation shortfall related to the expansion or improvement shall be borne by the developer;
 - c. Revenues generated by and collected from the expansion or improvement shall reflect growth related operational and maintenance expenditures for such expansion or improvement; and
 - d. Nothing herein shall be deemed to abrogate the current City policy and practice of prorating and reimbursing design and construction costs in accordance with the City's current Line Extension Policy, Policy No. 8.

b. Duties. In addition to the above, the Parties will have the following duties.

(1) The City shall assume the following fiscal responsibilities associated with any bond issuance or other obligation issued by the Authority pursuant to this Agreement, if the City is managing the System prior to transfer of the System or under contract with the Authority to manage the System:

- (a) Maintain fiscal records in accordance with generally accepted accounting procedures;
- (b) Provide strict accountability of all receipts and disbursements;
- (c) Establish a uniform system of accounts;
- (d) Pay all bond payments and other obligations and expenses related thereto as directed by the Authority;
- (e) Prepare a financial report showing the receipts, expenditures and

balances for each account or fund on an annual basis at the close of each fiscal year; and

(f) Invest operating and excess funds not required for current operations in accordance with applicable laws.

(2) The Authority shall assume the fiscal responsibilities identified in Section 15.b.1 if it has assumed management of the System.

(3) The Authority shall compensate the City for services rendered on behalf of the Authority under Section 15.b.1 at actual City cost, as determined by the City and approved by the Authority. Such compensation shall be considered an operation and maintenance expense of the System.

16. Term and Termination of Agreement.

(a) This Agreement may be terminated either (i) by the consent of all Parties, if the bonds or other obligations issued under this Agreement by the Authority have been assumed in their entirety by a successor public agency or agencies or such bonds or obligations are no longer outstanding, i.e., have been paid in full or defeased or (ii) when the bonds issued under this Agreement have been assumed by the Authority under legal authority separate from this JPA. Any successor agency or agencies to the Authority assuming any revenue bonds or other obligations, in accordance with this Section must also possess and control the System and Net Revenues of the System in order to effectuate termination in accordance with this Section.

(b) If the Authority is terminated and there is a successor public agency or agencies authorized to carry on the activities of the Authority and assume its obligations, then all property, rights and assets of the System shall be transferred to the successor public agency(ies) in accordance with law.

(c) If the Authority is terminated, and assuming payment in full or defeasance of any bonds or obligations issued in accordance with this Agreement, and no successor public agency, then the property, rights and assets of the Authority shall be divided between the Parties in accordance with any legislation terminating the Authority; if the legislation does not direct a division of such property, rights and assets, then the same shall be divided between the Parties as agreed to on the date of termination.

17. Headings. The headings of the sections of this Agreement are inserted only for convenience or reference and are not intended or to be construed to modify, define, limit or expand the intent of the Parties.

18. Entire Agreement. This Agreement represents the entire agreement and understanding between the Parties.

19. Amendments. The Parties acknowledge and agree that this Agreement may be amended in writing upon approval of the governing bodies of each Party and that any such amendments shall not become effective until signed by the Parties, provided that no such amendment shall materially adversely affect any bonds or other obligations then outstanding.

20. Effective Date. This Agreement shall become effective upon execution by all Parties, approval by the New Mexico Department of Finance and Administration and upon transfer of the System to the Authority.

IN WITNESS WHEREOF, each Party has executed this Agreement on the date first written above.

CITY OF ALBUQUERQUE

By: _____ Date: _____
Jay Czar, Chief Administrative Officer

APPROVED AS TO FORM:

Robert M. White, City Attorney

ATTEST:

City Clerk

(seal)

COUNTY OF BERNALILLO

BOARD OF COUNTY COMMISSIONERS

Tom Rutherford, Chair

Alan B. Armijo, Vice Chair

Steve D. Gallegos, Member

E. Tim Cummins, Member

Michael Brasher, Member

APPROVED AS TO FORM:

Tito Chavez, County Attorney

ATTEST:

Mary Herrera, County Clerk

(seal)

ALBUQUERQUE-BERNALILLO WATER UTILITY AUTHORITY

By: _____ Date: _____
Martin Chavez, Chairman

ATTEST:

Nann M. Houliston,
Interim Chief-of-Staff

APPROVED BY:

NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION

By: _____ Date: _____